

**IN THE HIGH COURT OF UTTARANCHAL AT
NAINITAL.**

(Court's order whether the case is approved
for reporting or not)

[Chapter VIII Rule 32 (2)(b)]

Description of case.

Writ Petition No. 288 (S/S) of 2002
(Old no. 31424 of 1991)

Smt. Jupli Devi and others. Petitioners.

Versus

State of Uttarkashi and another. Respondents

Approved for reporting. (Yes)

~~Not approved for reporting.~~

Date of Decision October 6, 2005

Initial of Judge

**IN THE HIGH COURT OF UTTARANCHAL AT
NAINITAL.**

Writ Petition No. 288 (S/S) of 2002
(Old no. 31424 of 1991)

1. Smt. Jupli Devi W/o late Sri Bachan Negi,
 2. Birendra Pratap Singh (Son),
 3. Km. Sakuntala (Married Dayghter),
 4. Km. Anita (Daughter),
 5. Km. Anamika (Daughter),
 6. Gagendra Singh (Son),
- All resident of village Shyalkund,
Patti Koti, Faigul, Tehsil Pratap Nagar,
District Tehri Garhwal. Petitioners.

Versus

1. District Judge, Uttarkashi, District Uttarkashi.
 2. State of Uttaranchal.
- Respondents

Hon'ble M.M. Ghildiyal, J.

Heard Sri S.N. Babulkar, learned Senior Counsel assisted by Sri Tumul Nainwal, Adv. for the petitioners and Sri Sharad Sharma, Adv. Special Counsel engaged for the respondent.

Initially the writ petition was filed by Sri Bachan Singh Negi who was an employee of Uttarkashi Judgeship and after his death, which took place on 3rd May 2004, his legal heirs i.e. the present petitioners have been substituted in his place vide orders of this Court passed on 17.07.2004.

By means of this writ petition, the petitioner has prayed to issue a writ in the nature of certiorari for

quashing of order dated 26.08.1991 passed by District Judge, Uttarkashi by which the petitioner, namely, Sri Bachan Singh Negi (now deceased), who was working as Central Nazir in the Judgeship at the relevant time, was removed from his services.

The facts of the case, in brief, are that the petitioner was initially appointed on 18.05.1978 as Clerk in the Tehri Judgeship. On 27th February 1982, he was promoted as Reader and was posted in the Uttarkashi Judgeship. On 1st August 1985, the petitioner was promoted as Record-Keeper. On 20.02.1989, the petitioner was transferred to Central Nazarat as Nazir in the Judgeship and while he was working as Central Nazir on 05.01.1990 an incident of theft was occurred in the Nazarat. A first information report was lodged for the theft under Section 406, 409, 420, 466, 477 Ka, and 120 IPC with the Uttarkashi police station. The petitioner was not named in the said F.I.R. however, during the investigation, the name of the petitioner, came into light. A preliminary inquiry was held by the Munsif Magistrate, Uttarkashi and after receipt of the report of Inquiry Officer, the petitioner was suspended vide order dated 19.01.1990.

An Inquiry Officer was appointed on 02.02.1991. Since the Inquiry Officer who was appointed on 2nd February 1991 had issued charge sheet to the petitioner on 1st February 1991, prior to his appointment as Inquiry Officer consequently, the petitioner made complaint to the District Judge on which the Inquiry Officer was changed. Vide order dated 27.03.1991 another Inquiry Officer was appointed by the District Judge, Uttarkashi

who served the charge sheet on the petitioner on 30th March 1991, to which the petitioner has replied on 05.04.1991.

The Inquiry Officer has leveled as many as ten charges against the petitioner.

After concluding the inquiry, the Inquiry Officer on 15.09.1991 submitted its inquiry report to the District Judge, Uttarkashi. The Inquiry Officer in its report dated 15th July 1991 has held that the charge no. 1 & 2 have been partially proved, charge no. 3,4,5,6,7,9 and 10 have not proved and in respect of the charge no. 8 it was held that it was proved against the petitioner.

The charge nos. 1, 2 & 8 were to the following effect:-

1. That the petitioner/ delinquent official was failed to disburse the salary of Sri D.P. Panyuli & Sri Madan Mohan Dimari Dy. Nazir. The amount of salary had been withdrawn from the Bank by the delinquent employee but he did not pay this sum to the officials as salary and thus, the money was misappropriated.
2. That the petitioner, delinquent official was failed to disburse the salary to Sri Jai Prakash for the month of December 1989 and thus the money was misappropriated.
3. That the petitioner, delinquent official made false entries in the registers and indicated that he had disbursed the salary to Sri Jai Prakash and Sri Madan Mohan Dimari on 01.01.1990, but actually no such payment was made.

After the inquiry report was submitted by the Inquiry Officer, the disciplinary authority i.e. the District Judge, Uttarkashi disagreeing with the report of Inquiry Officer, issued show cause notice to the petitioner on 29th July 1991 to which the petitioner replied on 12th August 1991. In its reply the petitioner has specifically mentioned that he may be provided opportunity of personal hearing.

The District Judge, Uttarkashi, on 26th August 1991 passed the impugned order by which the petitioner was removed from the services and order of realization of an amount of Rs. 14,298.50/- from the petitioner was also passed. Aggrieved with the order, the petitioner filed the present writ petition in the Allahabad High Court and the Allahabad High Court on 31.10.1991 has stayed operation of the impugned order dated 26th August 1991.

A criminal proceeding was also initiated against the petitioner on the same allegations in the Court of Chief Judicial Magistrate, Uttarkashi and the trial Court vide its judgment dated 6th January 2001 has acquitted the petitioner, as no charges were proved against him.

After the death of the petitioner, the legal heirs of the petitioner moved application on 30.05.2004 for substitution which was allowed vide Court's order dated 17th July 2004.

Learned counsel for the petitioner has challenged the impugned order on the following grounds:-

Firstly, that since the departmental proceedings as well as the criminal case against the petitioner was based on the identical set of facts and the evidence in both the

proceedings were common, and since the petitioner has already been acquitted in criminal case, as such, the order of dismissal already passed before the decision of criminal case, is liable to be set-aside.

Secondly, the Inquiry Officer in its inquiry report has stated that the charge nos. 1 & 2 were partially proved, charge nos. 3,4,5,6,7,9 & 10 were not proved and only the charge no. 8 was proved against the petitioner. the disciplinary authority, disagreeing with the findings of Enquiry Officer has held that the charges against the petitioner have been proved and issued show cause notice. The opinion of disciplinary authority if has been differentiated with the findings of Inquiry Officer then the impugned order should not be a final opinion but it should be a tentative opinion as no final opinion can be recorded by the punishing authority without giving opportunity of hearing to the petitioner. The petitioner has specially mentioned in his reply on the show cause notice that he may be given opportunity of personal hearing.

Lastly, the ground on which the petitioner has assailed the impugned order is that the punishment awarded to the petitioner is disproportionate to the gravity of the charges.

So far as the first point is concerned that the departmental proceedings as well as criminal case against the petitioner were based on the identical sets of facts and evidence. Since the petitioner has already been acquitted in the criminal case the order of dismissal passed by the Disciplinary Authority is liable to be set aside.

Learned counsel for the petitioner has placed reliance in the case of Captain. M. Paul Anthony Vs. Bharat Gold Mines Ltd. and another reported in AIR 1999 Supreme Court 1416. The Apex Court after considering the various judgments of the Supreme Court, in para 22 has held as under:

22. *The conclusion which are deducible from various decisions of this court referred to above are:*

- (i) *Departmental proceedings and proceedings in a criminal case can proceed simultaneously as there is no bar in their being conducted simultaneously, though separately.*
- (ii) *If the departmental proceedings and the criminal case are based on identical and similar set of facts and the charges in the criminal case against the delinquent employee is of a grave nature which involves complicated questions of law and facts, it would be desirable to stay the departmental proceedings till the conclusion of the criminal case*
- (iii) *Whether the nature of a charge in a criminal case is grave and whether complicated questions of fact and law are involved in that case, will depend upon the nature of offence, the nature of offence, the nature of the case launched against the employee on the basis of evidence and material collected against him during investigation or as reflected in the charge sheet.*
- (iv) *The factors mentioned at (ii) and (iii) above cannot be considered in isolation to stay the departmental proceedings but due regard has to be given to the fact that the departmental proceedings cannot be unduly delayed.*

(v) *If the criminal case does not proceed or its disposal is being unduly delayed, the departmental proceedings, even if they were stayed on account of the pendency of the criminal case, can be resumed and proceeded with so as to conclude them at an early date, so that if the employee is found not guilty his honour may be vindicated and in case he is found guilty, administration may get rid of him at the earliest.*

In para 34 of this judgement the Apex Court has further held as under: *"The findings recorded by the Inquiry Officer, a copy of which has been placed before us, indicate that the charges framed against the appellant were sought to be proved by the Police Officers and Panch witnesses, who had raided the house of the appellant and had effected recovery. They were the only witnesses examined by the Inquiry Officer, and the Inquiry Officer, relying upon their statements, came to the conclusion that the charges were established against the appellant. The same witnesses were examined in the criminal case but the court, on a consideration of the entire evidence, came to the conclusion that no search was conducted nor was any recovery made from the residence of the appellant. The whole case of the prosecution was thrown out and the appellant was acquitted. In this situation, therefore, where the appellant is acquitted by a judicial pronouncement with the finding that the 'raid and recovery' at the residence of the appellant were not proved, it would be unjust, unfair and rather oppressive to allow the findings recorded at the exparte departmental proceedings, to stand."*

In the present case also the departmental proceedings as well as the criminal case against the

petitioner were based on the identical set of facts and evidence and since the petitioner has already been acquitted in criminal case, as such, to maintain the order passed by the Disciplinary Authority dismissing the petitioner from service would be unjust and unfair. It is not disputed that ten charges were framed against the petitioner and the Inquiry Officer also in its inquiry report has held that charges no. 1 and 2 were partially proved, charges no. 3 to 7 and 9 – 10 were not proved and only charge no. 8 was proved against the petitioner. The Disciplinary Authority was disagreed with the findings recorded by the Inquiry Officer had issued a notice to the petitioner on 29.07.1991 and after discussion, in the last para of the notice held as under:

“It is proved that Sri Bachan Singh Negi the then Central Nazir indulged in the acts of commission and omission, which are that of grave magnitude

***** *Consequently, Sri Bachan Singh Negi to show cause as to why he would not be removed from service and a sum of Rs. 14,298.50 being the amount misappropriated by him be not recovered from him. He is required to submit his reply by or before 12.08.1991 positively.*

Learned counsel for the petitioner has submitted that the Inquiry Officer exonerates the delinquent but the Disciplinary Authority disagrees and comes to its contrary findings. The Disciplinary Authority instead of forming tentative opinion had come to a final conclusion that the charges against delinquent were established. The Disciplinary Authority was not right in coming to the

conclusion without affording any opportunity to the petitioner. in support of his submission, learned counsel for the petitioner has placed reliance on the judgement of Apex Court reported in Judgement Today 1999 (6) SC 62 Yoginath D. Bagde Vs. State of Maharastra wherein the Apex Court has held that it is open to the Disciplinary Authority either to agree or disagree with the findings recorded by the Inquiry Authority. If it does not agree with the findings of the Inquiry Authority, it may record its own finding. The Apex Court in para 28 of the said judgment has held as under:

“Difficulties have arisen in all those cases in which the Inquiring Authority has recorded a positive finding that the charges were not established and the delinquent officer was recommended to be exonerated but the Disciplinary Authority disagreed with those findings and recorded its own findings that the charges were established and the delinquent officer was liable to be punished. This difficulty relates to the question of giving an opportunity of hearing to the delinquent officer at that stage. Such an opportunity may either be provided specifically by the Rules made under Article 309 of the Constitution or the Disciplinary Authority may, on its own, provide such an opportunity. Where the Rules are in this regard silent and the Disciplinary Authority also does not give an opportunity of hearing to the delinquent officer and records findings, different from those of the inquiring authority that the charges were established, “an opportunity of hearing” may have to be read into the Rule by which the procedure for dealing with the Inquiring Authority’s report is provided principally because it would be contrary to the principles of natural justice if a delinquent officer, who has already been held to be ‘not

guilty' by the Inquiring Authority, is found guilty without being afforded an opportunity of hearing on the basis of the same evidence and material on which a finding of "not guilty" has already been recorded."

In para 33 of the aforesaid judgement it is further held as under:

A delinquent employee has the right of hearing not only during the enquiry proceedings conducted by the Inquiry Officer into the charges levelled against him but also at the stage at which those findings are considered by the Disciplinary Authority forms a tentative opinion that it does not agree with the findings recorded by the Inquiry Officer. If the findings recorded by the Inquiry Officer are in favour of the delinquent and it has been held that the charges are not proved, it is all the more necessary to give an opportunity of hearing to the delinquent employee before reserving those findings. The formation of opinion should be tentative and not final. It is at this stage that the delinquent employee should be give an opportunity of hearing after he is informed of the reasons on the basis of which the Disciplinary Authority has proposed to disagree with the findings of the Inquiry Officer. This is in consonance with the requirement of Article 311 (2) of the Constitution as it provides that a person shall not be dismissed or removed or reduced in the rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. So long as a final decision is not taken in the matter, the inquiry shall be deemed to be pending. Mere submission of findings to the Disciplinary Authority does not bring about the closure of the inquiry proceedings. The inquiry proceedings would come to an end only when the findings have

been considered by the Disciplinary Authority and the charges are either held to be not proved or found to be proved and in that even punishment is inflicted upon the delinquent. That being so, the "right to be heard: would be available to the delinquent up to the final stage. This right being a constitutional right of the employee cannot be taken away by any legislative enactment or Service Rule including Rules made under Article 309 of the Constitution"

Applying the aforesaid principles laid down by the Apex Court, before coming to the conclusion that an opportunity of hearing must be provided to the delinquent and merely issuing show cause notice, after coming to the conclusion for dismissal, would not serve the purpose of natural justice. At least an opportunity of hearing to the delinquent must be provided before recording the findings by the Disciplinary Authority that the findings recorded by the Inquiry Officer were not just and proper.

In the present case a notice issued to the delinquent was just like a formality. Instead of framing tentative opinion the Disciplinary Authority has framed final opinion prior to giving notice to the delinquent for hearing and as such, there was clear violation of principle of natural justice.

Another point on which the petitioner has assailed is that the punishment given by way of impugned order can be reduced by this court, in case, the punishment of dismissal is shocking, disproportionate. It is observed by this court that the order of dismissal itself was passed in utter violation of principle of natural justice and as such

the court need not to go to the question of reducing punishment.

Learned counsel for the respondents has submitted that the petitioner has alternative remedy to file departmental appeal against the impugned order. No doubt, the alternative remedy is there but the alternative remedy is not a complete bar. The writ petition was filed in the year 1991 and the Allahabad High Court stayed the operation of impugned order. On the basis of that order, the petitioner was permitted to work continuously and unfortunately he died while he was working. Heirs of the petitioner have been substituted. No purpose will be served now to send the heirs of the deceased to avail alternative remedy.

For the reasons recorded above, writ petition is allowed. Impugned order dated 26.08.1991 passed by District Judge, Uttarkashi is quashed. No order as to costs.

(M.M. Ghildiyal, J.)

October 06, 2005

SKSharma